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2009 JUN 25 AM 9:48

OFFICE OF GENERAL  
COUNSEL

June 24, 2009

Federal Election Commission  
Office of General Counsel  
999 E Street, NW  
Washington, DC 20463

Re: Advisory Opinion Request

AOR 2009-19

Dear Commissioners:

On behalf of the Club for Growth ("Club") and Club for Growth PAC ("Club PAC"), I request an advisory opinion from the Federal Election Commission ("FEC" or "Commission") pursuant to 2 U.S.C. § 437f regarding proposed communications.

In short, either the Club or the Club PAC plan to send one mailing or make one phone call to individual donors to Citizens for Arlen Specter campaign informing the donors of Sen. Arlen Specter's decision to run for US Senate as a Democrat instead of as a Republican. The communication would inform the donors about his policy of providing refunds upon request to those who donated to his campaign while he was a Republican. The communications would not contain a solicitation of any kind for any candidate or organization. The list of Citizens for Arlen Specter donors would be compiled from filings by that committee with the FEC.

Based on the clear language of the statute and the regulations, it appears that such communications are clearly permissible, especially for such an unusual set of circumstances not likely to be repeated soon, as is the case here.

#### FACTS

##### **A. Club for Growth and Club for Growth PAC.**

The Club is an incorporated nonprofit membership organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code. The Club is organized under the laws of the District of Columbia and has its principal place of business in Washington, D.C. It is a qualified nonprofit organization under FEC regulations.

The Club PAC is the separate segregated fund of the Club and is a multicandidate committee under the FEC's regulations.

## **B. Proposed Communications**

Sen. Specter recently publicly announced that he would run for US Senate as a Democrat (see attached press release from the Citizens for Arlen Specter committee). However, despite the requirement that such a change be reported to the FEC within 10 days, his campaign did not file an amended statement to FEC confirming this fact until June 15, according to information listed on the FEC website.

In the cited press release, Sen. Specter says "Upon request, I will return campaign contributions contributed during this cycle." An Associated Press account, also attached, seems to confirm his intent to return such contributions upon request from any donor who supported his 2010 election campaign while he was a Republican.

Either the Club or Club PAC plans to send a letter to individual donors of Citizens for Arlen Specter informing them of Sen. Specter's decision to switch to the Democratic Party and his policy of returning donations upon request. The list of individual donors of Citizens for Arlen Specter would be compiled using information that committee has filed with the FEC. The letter would include a preprinted form letter and envelope that would allow the donor to request a refund. The form letter and enclosed envelope would be addressed to the Citizens for Arlen Specter committee, and thus the Club or Club PAC would not know who responded to the communication to request a refund. Alternatively, for donors with published phone numbers, we may make a phone call to the donor. The phone call would inform the donor that Sen. Specter has switched to the Democratic Party and inform the donor of his refund policy. We would then ask if the donor would like us to mail him or her information on how to request the refund or provide information on how to request a refund during the telephone call.

*We understand that there is nothing in the law or regulations that would require the Citizens for Arlen Specter committee to honor any request for a refund, and our letter would tell the donor of this fact.*

The communications would not contain any solicitation of any kind whether for the Club, Club PAC, any candidate or any other entity.

The communication would only be made once to each donor as described above. Follow up mailings and phone calls would not be made.

It would not urge the donor to support or oppose any candidate. Indeed, it would not even mention the name of any other candidate.

The proposed communication would be made independently of any other candidate or political party.

The Club and Club PAC would not make the list available to any other entity for any use. The Club and Club PAC would not use the list for any other purpose and would not retain the list for any other purpose. The Club and Club PAC would not put any of the contact information obtained from FEC filings into our general membership database, but instead

will keep it separate, and only for the purpose of the communication presented in our request.

### QUESTION PRESENTED

*May such a communication be sent by the Club or Club PAC to the Citizens for Arlen Specter donors using information compiled from committee reports filed with the FEC?*

### DISCUSSION

USC 438(a)(4) states:

The Commission shall—within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes.

The relevant regulation, 11 CFR 104.15 states:

Sale or use restriction (2 U.S.C. 438(a)(4)).

(a) Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committee.

(b) For purposes of 11 CFR 104.15, soliciting contributions includes soliciting any type of contribution or donation, such as political or charitable contributions.

In 943 F.2d 190, the United States Court of Appeals, Second Circuit, provides the definitive legislative history of § 438(a)(4):

The § 438(a)(4) "commercial purposes" exception was proposed as an amendment to that section by Senator Bellmon of Oklahoma:

Mr. President, the purpose of this amendment is to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party. We all know how much of a business the matter of selling lists and list brokering has become. These names would certainly be prime prospects for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment, and in that way tend to discourage them from helping out as we need to have them do. 117 Cong.Rec. 30.057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).

Senator Bellmon's amendment was grudgingly accepted by the bill's sponsor. Senator Cannon, who replied:

Mr. President, this is certainly a laudable objective. I do not know how we are going to prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment, and I yield back the remainder of my time.

Id. (statement of Sen. Cannon). Senator Bellmon went on to give an example of the evils he was attempting to combat with his amendment:

MR. BELLMON. \* \* \*.

*In the State of Oklahoma, our own tax division sells the names of new car buyers to list brokers, for example, and I am sure similar practices are widespread elsewhere. This amendment is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized by that practice.*

MR. NELSON. Do I understand that the only purpose is to prohibit the lists from being used for commercial purposes?

MR. BELLMON. That is correct.

\* \* \* \*

MR. BELLMON. That is right; but the list brokers, under this amendment, would be prohibited from selling the list or using it for commercial solicitation.

Consistent with the regulations and the legislative history of this provision, the proposed communication by the Club or Club PAC to donors of Citizens for Specter would not involve list brokering, commercial use or nonprofit solicitation.

Clearly under the plain language of the law, the regulations and the legislative history of the statute, the communication should be permitted.

The FEC issued an Advisory Opinion permitting a communication in a case with an analogous set of facts. In AO 1984-2 when Phil Gramm asked if he could write donors to "Americans for Phil Gramm in '84" retrieved from FEC filings and inform the donors it was not an authorized committee of Phil Gramm for president. Gramm also asked if he could suggest to contributors that they ask for a refund. The FEC said yes on both counts though it said Gramm could not suggest donors give to his committee:

Accordingly, the Commission concludes that informing contributors to "Americans for Phil Gramm in '84" that it is not your authorized campaign committee and identifying "Friends of Phil Gramm" as the name of your authorized campaign committee for the purposes of setting the record straight

would not be a prohibited use of contributor information under 2 U.S.C. 438 (a)(4) or Commission regulations at 11 CFR 104.15. In addition, your mailing could also include a suggestion that the contributor ask for a refund from "Americans," although neither the Act nor Commission regulations accord contributors any right to refunds in this situation. Requesting or suggesting that contributions be made to your authorized campaign committee, however, would involve use of contributor information in a manner that is prohibited by 2 U.S.C 438(a)(4) and 11 CFR 104.15. The Commission also notes that because contributions to "Americans" are seemingly made with the knowledge that they would be expended on behalf of Phil Gramm, the amount of any contribution would be attributable to a contributor's maximum allowable contribution to Phil Gramm. See 11 CFR 110.1(h).

<http://saos.nictusa.com/saos/aonum.jsp?AONUM=1984-02>)

In another analogous advisory opinion, Rep. Findley asked if he could write to donors of his opponent to "set the record straight on certain defamatory charges made against me." The FEC said yes. (<http://saos.nictusa.com/saos/searchao?AONUMBER=1981-05>)

In 2003, the FEC rejected an advisory opinion request (2003-24) from the National Center for Tobacco Free Kids ("NCTFK") where the group planned to use FEC data to send repeated mailings on tobacco policy issues to donors to candidates. While none of the mailings would have contained solicitations, the FEC distinguished between the Gramm and Findley requests and the NCTFK AOR here:

In two previous Advisory Opinions, the Commission has allowed limited communications to contributors whose names had been obtained from reports of contributions. *See, e.g.*, Advisory Opinions 1984-2 and 1981-5. In Advisory Opinion 1984-2, the Commission determined that a communication for the purpose of correcting a misunderstanding caused by the activities of an unauthorized campaign committee was permissible under the Act. The permitted communication informed persons who contributed to the unauthorized campaign committee that such committee was not the authorized campaign committee of the candidate and that the persons could request a refund of their money. The communication did not ask for support of or a donation to the authorized campaign committee. In Advisory Opinion 1981-5, the Commission determined that a communication for the purpose of correcting a misunderstanding caused by defamatory charges made against the requesting candidate was permissible under the Act. The permitted communication "set the record straight on certain defamatory charges" made against the candidate. These advisory opinions involved one-time, one-way communications of a corrective nature that did not involve solicitation or commercial purposes or the possibility of either, and are thus distinguishable from the broader, open-ended interaction contemplated by your request.

In any event, our proposed communication is not at all like the communications proposed by NCTFK, where multiple mailings would be done over a long period of time. Our one-time, one-way proposed communication therefore is very similar to the Gramm and

Findley communications. Our communication only "involve[s] one-time, one-way communications of a corrective nature that did not involve solicitation or commercial purposes or the possibility of either, and are thus distinguishable from the broader, open-ended interaction contemplated by [the NCTFK] request."

At the time of the donation, Sen. Specter was running for office as a Republican, and presumably a large majority of the donors sought to support the election of a Republican in making the donation. Those funds have now been converted to the campaign account of a Democrat. Our communication would simply inform donors of the situation in order to set the record straight and to ensure that they have the facts on the situation so that the donor could take corrective action if desired.

This situation is nearly unprecedented, and is unlikely to occur with any regularity, thus making our communication quite similar in kind to those permitted in the Gramm and Findley Advisory Opinions.

In the enforcement cases (MURs 6053 and 6065) regarding Huffington Post.com, the FEC dismissed a complaint that donors to candidates were subjected to harassment from techniques that used search engine optimization in conjunction with FEC donor data to drive traffic to the Huffington Post.com, which would then benefit commercially from a gain in advertising revenue. The complainant was shocked to find that her name and address would come up in search engine inquiries, which she stated "is a major security concern to me . . . I need you to protect my privacy rights." Yet despite the concern expressed about the potential for harassment, the FEC found Huffington Post.com had not violated the restriction banning the use of donor records for a commercial purpose.

In the recently dismissed MUR 6096, three commissioners expressed dismay at the wording of a letter sent, saying they believed it was harassing in nature. These commissioners wished to continue MUR 6096, however the enforcement action was dismissed on a 3-3 vote.

Our proposed communication would not have any of the troubling aspects that were cited by three of the commissioners in MUR 6096. Instead, it is precisely like the Gramm and Findley communications and easily distinguished from the letter in MUR 6096 and the proposed communications in NCTFK.

We believe the most recipients would welcome the communication as it would provide information as to how they can request a refund of their previous donation in conformance with Sen. Specter's pledge to do so when requested. In the current economic circumstances, many donors may well find relief that they can get a refund of their donation, which was made under a completely different set of circumstances. We imagine that a number of these donors did not intend that their contributions would be used to support the reelection campaign of a Democrat in the US Senate.

## CONCLUSION

The proposed communication is in conformance with both the statute and regulations that bar the use of information from FEC reports for the "purpose of soliciting contributions or for any commercial purpose" because the communication would not contain a solicitation of any kind for any entity. Furthermore the communication is a one-time one-way communication that provides information regarding a campaign and is very similar to those permitted in previous Advisory Opinions. Finally the proposed communication is non-threatening to the recipient and would likely be welcomed by many if not nearly all of them. For all these reasons, we urge the Commission to approve the proposed communication.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Keating', with a large, stylized flourish at the end.

David Keating  
Executive Director

## Specter2010 PRESS RELEASES

Statement by Arlen Specter

April 28, 2009

I have been a Republican since 1966. I have been working extremely hard for the Party, for its candidates and for the ideals of a Republican Party whose tent is big enough to welcome diverse points of view. While I have been comfortable being a Republican, my Party has not defined who I am. I have taken each issue one at a time and have exercised independent judgment to do what I thought was best for Pennsylvania and the nation.

Since my election in 1980, as part of the Reagan Big Tent, the Republican Party has moved far to the right. Last year, more than 200,000 Republicans in Pennsylvania changed their registration to become Democrats. I now find my political philosophy more in line with Democrats than Republicans.

When I supported the stimulus package, I knew that it would not be popular with the Republican Party. But, I saw the stimulus as necessary to lessen the risk of a far more serious recession than we are now experiencing.

Since then, I have traveled the State, talked to Republican leaders and office-holders and my supporters and I have carefully examined public opinion. It has become clear to me that the stimulus vote caused a schism which makes our differences irreconcilable. On this state of the record, I am unwilling to have my twenty-nine year Senate record judged by the Pennsylvania Republican primary electorate. I have not represented the Republican Party. I have represented the people of Pennsylvania.

I have decided to run for re-election in 2010 in the Democratic primary.

I am ready, willing and anxious to take on all comers and have my candidacy for re-election determined in a general election.

I deeply regret that I will be disappointing many friends and supporters. I can understand their disappointment. I am also disappointed that so many in the Party I have worked for for more than four decades do not want me to be their candidate. It is very painful on both sides. I thank especially Senators McConnell and Cornyn for their forbearance.

I am not making this decision because there are no important and interesting opportunities outside the Senate. I take on this complicated run for re-election because I am deeply concerned about the future of our country and I believe I have a significant contribution to make on many of the key issues of the day, especially medical research. NIH funding has saved or lengthened thousands of lives, including mine, and much more needs to be done. And my seniority is very important to continue to bring important projects vital to Pennsylvania's economy.

I am taking this action now because there are fewer than thirteen months to the 2010 Pennsylvania Primary and there is much to be done in preparation for that election. Upon request, I will return campaign contributions contributed during this cycle.

While each member of the Senate caucuses with his Party, what each of us hopes to accomplish is distinct from his party affiliation. The American people do not care which Party solves the problems confronting our nation. And no Senator, no matter how loyal he is to his Party, should or would put party loyalty above his duty to the state and nation.

My change in party affiliation does not mean that I will be a party-line voter any more for the Democrats that I have been for the Republicans. Unlike Senator Jeffords' switch which changed party control, I will not be an automatic 60th vote for cloture. For example, my position on Employees Free Choice (Card Check) will not change.

Whatever my party affiliation, I will continue to be guided by President Kennedy's statement that sometimes Party asks too much. When it does, I will continue my independent voting and follow my conscience on what I think is best for Pennsylvania and America.



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## Specter says he'll return donors' money, if asked

Posted 5/1/2009 3 25 PM ET

PHILADELPHIA (AP) — Campaign supporters disappointed by Pennsylvania Sen. Arlen Specter's decision to switch parties can have their donations refunded if they choose, the senator said Friday.

Specter, making his first appearance in the state since becoming a Democrat earlier this week, said he was unaware if anyone had asked for refunds. But he noted he has "already had the checks cut" to return contributions Senate colleagues made to his political action committee.

Specter said he would not ask fellow senators to return donations that his committee made to their campaigns.

"They fit in my tent. I just don't fit in theirs," he said.

His comments came during a news conference at 30th Street Station in Philadelphia, shortly after a passer-by shouted, "I want my money back!"

The senator has been a Republican since 1965. His moderate views have often put him at odds with the party and he said polling data indicated "bleak" prospects for re-election in 2010 if he remained with the GOP.

Specter said he has plenty of opportunities to work in the private sector but wants to see through Senate legislation regarding health care reform, climate change and medical research.

Specter is expected to face Philadelphia-area civic leader Joe Torsella in the Democratic primary.

U.S. Rep. Joe Sestak, D-Pa., has also expressed interest in challenging Specter but a spokesman said Friday he has not yet made a decision.

Pat Toomey, a former congressman who almost defeated Specter in the 2004 GOP primary, is running for the Republican nomination.

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